Supreme Court, U.S.
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# 88-1201

NO.....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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DARREL G. HARDEN,

Petitioner,

v.

C. W. BERT, D. M. EGLE, J. E. FRANCIS, M. C. JISCHKE, T. J. LOVE, W. R. UPTHEGROVE, Individually, and THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a subdivision of the State of Oklahoma,

Respondents.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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January, 1989

## QUESTIONS PRESENTED

1. Can a court, when required to apply state law, do so arbitrarily, applying it in one case and not applying it on another arising under the laws of the same state?

2. Is academic freedom a constitutionally protected right for the purposes of 42 U.S.C. §§ 1983, 1985(3)?

3. Is tenure or the income from it a property right which individuals acting under color of state law cannot constructively take away to circumvent due process?

4. Do tenured professors constitute a class for stating a cause of action under 42 U.S.C. § 1985(3)?

5. Did Title VII repeal the right to assert a § 1985(3) action when Fourteenth Amendment rights are violated?

6. Does Eleventh Amendment immunity also extend to the State's insurer who by contract has become the real party in interest?

7. Can a court arbitrarily sustain a motion to dismiss because it believes well-pled facts cannot be proved?

8. Do continuing violations of federal law necessitate injunctive relief?

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## JURISDICTION STATEMENT

The final Order And Judgment of the Tenth Circuit Court of Appeals was entered on the 20th day of October, 1988. The Court en banc denied Petitioner's request for rehearing.

There is no right in Petitioner for review by the Supreme Court of the United States. However, he requests a permissive review through Certiorari, as allowed by 28 U.S.C. § 1254(1) and Supreme Court Rule 17.1.(a) and (c) in the discretion of the court. The Tenth Circuit decision sought to be reviewed, which was prejudicial to this Petitioner, decided questions involving:

1. The tolling of the statute of limitations, which decision is contrary to the rule announced by the Supreme court of the State of Oklahoma, the state in which the cause of action arose.

2. A university professor with tenure, and finding (a) academic freedom and tenure were not rights warranting constitutional protection, and (b) that he did not represent a class of tenured teachers;

3. Constructive discharge and finding the alleged Fourteenth Amendment violations should have been prosecuted under Title VII rather than § 1985(3), notwithstanding the lack of discrimination allegations by reason of race, color, religion, sex or national origin.

4. Granting of Eleventh Amendment immunity not in conformity with the decisions of this Court or the Eleventh Circuit Court of Appeals;

5. Construction of the Complaint inconsistent with the rules; and

6. Denial of injunctive relief for continuing violations of federal law.

## STATEMENT OF THE CASE

The Petitioner, Dr. Darrel G. Harden (hereinafter referred to as Harden) is a tenured professor of mechanical engineering in the College of Engineering at the University of Oklahoma. He filed his action under 42 U.S.C. § 1983, 1985(3) and 1986 against six different supervisors, the individually named Defendants (hereinafter referred to as Defendants) and the Board of Regents of the University of Oklahoma (hereinafter referred to as University), both of whom are referred to collectively as the Respondents. His initial Complaint was filed February 28, 1986. His Second Amended Complaint (hereinafter referred to as 'Complaint') was filed August 15, 1986, and alleged that through deceit and unbeknownst to him, some of the Defendants conspired in 1973 and were later joined by the other Defendants who entered the existing conspiracy to get rid of Harden

by denying him promotion; deceiving him as to the recommendations of his professional colleagues; coersion and intimidation with threats to abrogate his tenure; imposing intolerable and unbearable working conditions upon him; and interference with and frustration of his academic freedom, research and development projects, acquisition and retention of graduate students to advise, application for sabbatical leave and defense of an erroneous sexual harassment charge against him, all in violation of his due process and the 14th Amendment rights.

Harden first learned of the concerted action and conspiracy in 1985 when he decided to make a final effort for promotion to full professor, having been an associate professor since 1967. He contacted his peers who he had given for confidential references in 1973, and learned for the first time that they would have been supportive of his promotion

had they been contacted, which alerted him to the deceit in Defendants' statement which he had believed that his promotion had been denied because of their non-support. With this discovery, facts began to fall into place, and he realized the other misfortunes that had befallen him were not by chance, but the result of acts in concert by the Defendants.

One example alleged in the Complaint of the frustration and interference systematically imposed on Harden involved a grade dispute. Defendants arbitrarily changed some of his student's grades from incomplete and failing to passing. He attempted to appeal, but Respondents stalled the process until Harden invoked the jurisdiction of a state trial court to mandate action. The Respondents then allowed the administrative appeal process to function, and an impartial Faculty Appeals Board from the University at

large vindicated Harden, finding there had been violations of due process, procedural irregularities, interference with Harden's academic freedom and they directed reconsideration. The grade problem was only then worked out to the satisfaction of Harden.

The Complaint alleged in more detail the violation of the University's duties to Harden, including the failure to provide him a safe place to teach and conduct research, failing to oversee, monitor and regulate working conditions, pay and promotion practices and complaint processing.

Harden asked for both money damages and injunctive relief against the Respondents.

Respondents filed their motion to dismiss. The District Court ruled (1) both the University and the Defendants in their official capacities are immune under the Eleventh Amendment, (2) the Complaint failed to state facts supporting the award of

injunctive relief, and (3) Harden's claims against the individual Defendants were barred by the applicable statute of limitations.

A hearing panel from the Tenth Circuit Court of Appeals affirmed that ruling, and further found the Complaint did not state a claim under either § 1983 or § 1985(3) because no federal rights were implicated, and that he consequently failed to state a claim under § 1986.

Harden requested rehearing and suggested en banc consideration by the Tenth Circuit. The Tenth Circuit Court of Appeals did review the petition for rehearing and concluded that the disposition was correct, and denied on the 20th day of October, 1988, Harden's petition for rehearing on the merits and the suggestion for en banc consideration. From such rulings, this writ for certiorari is perfected.

## REASONS FOR GRANTING THE WRIT

### I.

### FEDERAL COURTS WITHOUT OTHER GUIDANCE APPLY THE STATE LAW FOR DECIDING THE ISSUE OF THE TOLLING OF A STATUTE OF LIMITATIONS.

The appellate Order affirming the finding that the statute of limitations barred this action is contrary to the law of the State of Oklahoma, and must be reviewed.

Section 1988 of Title 42 of the United States Code, among other things, requires federal courts to look to principles of common law, as altered by state law, whenever federal law is insufficient to furnish suitable remedies. Runyon v. McCrary, 427 U.S. 160; 96 S.Ct. 2586; 49 L.Ed.2d 415 (1976). It is settled that federal law is insufficient to dispose of the issue of tolling of the statute of limitations, and, therefore, state law governs. Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

In Oklahoma, a case involving deceit and concealment, the statute of limitations begins to run only from the time of the discovery of the cause of action, or from such time as the aggrieved party, with ordinary diligence, might have discovered the fraudulent concealment. However, a different rule applies as to diligence when a fiduciary relationship exists between the parties, or one of trust and confidence. The principal in such a case has a right to rely upon the fidelity of the agent, and the agent is charged with the duty of revealing the facts to the principal. Under Oklahoma law, ordinary diligence does not require the principal to search out whether or not the fiduciary relationship was abused. Farmer's Bank v. Keen, 66 Okl. 62, 167 P. 207 (Okl.1917); Liberty National Bank of Weatherford v. Lewis, 172 Okl. 103, 44 P.2d 127 (Okl.1935).

Harden's Complaint alleged facts which established as an issue the fiduciary relationship between him and Defendant Bert. In testing his diligence, he should not be charged to discover if Bert abused the fiduciary relationship. However, the Tenth Circuit ruled contrary to Oklahoma law and extended the definition of ordinary diligence to include the duty on part of the deceived party to find out if the fiduciary relationship was abused by a fraudulent concealing of facts. It held that Harden did not exercise ordinary diligence to discover the deceit and his cause of action, hence was not entitled to a tolling of the statute of limitations.

Petitioner respectfully submits that the Order entered in this case by the Tenth Circuit, when compared with previous ruling by the same court, exhibits an arbitrary application of the Oklahoma law regarding

tolling the statute of limitations in cases involving fiduciary relationship. In United Fidelity Life Insurance Company v. Law Firm of Best, Sharp, Thomas and Glass, 624 F.2d 145 (10th Cir. 1980), the court applied Oklahoma law totally differently on the same issue. Petitioner, thinking the hearing panel might have overlooked the dispositive issue of fiduciary relationship, requested rehearing, citing again the Oklahoma authorities and the Tenth Circuit's own ruling, but to no avail. As no distinguishment of any kind was offered by the court or in the order denying rehearing, and the fact that the entire bench of Tenth Circuit denied Petitioner's suggestion for rehearing, it is apparent the Oklahoma law was side-stepped in this case. Harden respectfully asserts that the Tenth Circuit does not have such discretion. When federal courts are charged with applying state law, it is axiomatic they

should do it uniformly, consistently and fairly. Had the Tenth Circuit, at least, ruled that no fiduciary relationship is present in this case, it would have been an "error" in applying the Oklahoma law. What we have here is a deliberate "refusal" to apply Oklahoma law, which raises a valid question for this Honorable Court to answer, viz.:

> Can a federal court of appeals, when required to apply state law, do so arbitrarily, applying it in one case and not applying it on another, arising under the laws of the same state?

Harden believes the answer must be a resounding "No," and asks this Honorable Court to assume jurisdiction by granting certiorari.

## II

**ACADEMIC FREEDOM IS ACCORDED THE STATUS OF A CONSTITUTIONALLY PROTECTED RIGHT.**

The Tenth Circuit disregarded Harden's allegation of the violation of his constitutional right to academic freedom. He asserted the violation of a "right secured by the Constitution," thus bringing this action under the scope of Section 1983 of Title 42 of the United States Code. The Tenth Circuit did not agree, and thus, this issue warrants review.

Petitioner respectfully submits that although there is no explicit constitutional provision declaring academic freedom a protected right, this Honorable Court had interpreted academic freedom to be constitutionally protected in Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959), wherein this Court emphatically stated:

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this Constitutionally protected domain." Id. 360 U.S. at 112. (Emphasis added.)

From this Honorable Court's avowal to watch for the intrusion by the legislature in constitutionally protected academic freedom, it follows, naturally, that it would be on the alert also against the intrusion by the judiciary, in this case, the Tenth Circuit.

Petitioner believes that a professor is neither a "second-rate" citizen, nor that the rights given professors by this Honorable Court by decisions interpreting the Constitution are inferior to other constitutional rights. Academic freedom does not fall outside the scope of Sections 1983 and 1985(3) only because it is interpreted, rather than written in the Constitution. Petitioner urges review of the Tenth Circuit

Order, and requests a finding that a reference to Constitution or laws in Section 1983 and 1985(3) includes rights or privileges established by decisions interpreting the Constitution or laws by this court. While this may appear obvious, this Honorable Court made that specific ruling with regard to 18 U.S.C. § 241 in United States v. Kozminski, ____ U.S. ____, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), wherein this Court said:

> "Section 241 authorizes punishment when
>
> 'two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.'
>
> This Court interpreted the purpose and effect of § 241 over 20 years ago . . . (citations omitted). Section 241 creates no substantive rights, but prohibits interference with rights established by the Federal Constitution or laws and by decisions interpreting them. (Citations omitted.)

> Congress intended the statute to incorporate by reference a large body of potentially evolving federal law. This Court recognized, however, that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt. The Court resolved the tension between these two propositions by construing § 241 to prohibit only intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them. (Citation omitted.)" (Emphasis added by underlining.)

Sections 1983 and 1985(3) are the "civil" counterpart of 18 U.S.C. § 241. Ignoring the factor of definite standard of guilt in civil actions, the courts still have to deal with a large body of potentially evolving federal law regarding Sections 1983 and 1985(3), and a specific ruling that rights declared constitutional (or arising under law) by decisions of this Court are actionable under § 1983 and § 1985(3) would be

a boon for the vindication of civil rights. Under the authority of Barenblatt v. United States, supra, the following question would be answered in the affirmative:

> Is academic freedom a constitutional right for the purposes of 42 U.S.C. §§ 1983, 1985(3)?

While Harden believes the question has already been answered positively and affirmatively, it apparently is not so clear to others, and certiorari should be granted to clarify this issue.

## III

**TENURE IS A PROPERTY RIGHT, AND THE REQUIREMENT OF DUE PROCESS PRECLUDES CONSTRUCTIVE ABROGATION OF IT, OR ATTEMPTING TO CONSTRUCTIVELY ABROGATE IT.**

Harden is a tenured professor. The Defendants are or were his supervisors acting under color of state law, who had the right to try to abrogate his tenure - after giving him due process. They didn't do that. Instead,

they contrived and acted on a scheme of imposing intolerable working conditions on Harden to force him to resign. He suffered injury but refused to succumb to their tactics. On first learning of their deceit and misrepresentation and subsequent "putting together" their conspiracy in the Spring of 1985, Harden timely brought this action. Defendants maintain that Plaintiff is still employed at the University, therefore, no property was taken away from him and no process became due. The Tenth Circuit agreed, and affirmed the dismissal of Harden's action for want of federally protected rights.

Tenure, in the setting of academia, is provided to protect the freedom of teachers, and their incomes when they exercise that freedom. Allowing constructive taking of tenure, or attempts thereof, makes that protection meaningless. The Defendants and

the University in this case exacted a 'price' of diminished income and adverse working conditions from Petitioner for exercising his academic freedom. In effect, the Tenth Circuit said that such is alright, so long as Harden stayed, albeit nominally, on the payroll. Is this fostering academic freedom, or inhibiting it? Harden suffered injury only slightly less painful from Respondents' attempts to constructively take away his tenure, and this squarely fit the definition of violation of constitutionally protected property right. He admits that this precise question in the context of institutions of higher learning has not been answered by this Honorable Court. Based on Petitioner's research, the order entered by Tenth Circuit is the first such ruling. Nevertheless, Petitioner believes it to be contrary to applicable rule announced by this Honorable Court in Lindsey v. Normet, 405

U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 35 (1972), wherein this Court said:

> "Nor should we forget that the Constitution expressly protects against the confiscation of private property or the income therefrom."

Petitioner in his Complaint alleged that his income is severely compromised by Respondents attempts to constructively terminate him and to abrogate his tenure. Petitioner's tenure is personal property which he earned through his own hard work and toil. When his tenure is kept intact, but his ability to derive income from it is infringed, it is the taking of property, prohibited by this Court in Lindsey v. Normet, supra. The Tenth Circuit disagrees, and its Order allows a constructive deprivation of property, and it must be reviewed, for otherwise, protection of tenure becomes meaningless.

## IV

**TENURED TEACHERS CONSTITUTE A CLASS FOR STATING A CAUSE OF ACTION UNDER 42 U.S.C. § 1985(3).**

The Tenth Circuit's Order found the Complaint devoid of allegations of some sort of invidious class-based discrimination, and that it failed to state a cause of action under § 1985(3). Such a finding is contrary to the policy announced by this court, and its decision should be reviewed.

Petitioner respectfully submits that in this case the allegation of tenure, and the conspiracy to circumvent tenure protection suffices to bring this action under § 1985(3).

When Petitioner drew his complaint he had in mind the ruling in Silkwood v. Kerr-McGee Corporation, 637 F.2d 743 (1980); cert.den. 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111, wherein the Tenth Circuit said:

> "In order to support a section 1985(3) claim, the Plaintiff must

> be a member of a statutorily protected class, and the actions taken by defendant must stem from plaintiff's membership in the class."

The statutory protection of tenure in this case is authorized in Section 3305(K) of Title 70 of the Oklahoma Statutes:

> "The Board of Regents of the University of Oklahoma shall have the supervision, management and control of the University of Oklahoma and all its integral parts and shall have the following additional powers and duties:
>
> . . .
>
> (k) Establish and maintain plans for tenure and retirement of employees of the Board and of the University of Oklahoma, and for payment of deferred compensation of such employees; . . ."
>
> . . ."

The Complaint clearly states the purpose of the conspiracy was to take away Petitioner's tenure. He enjoyed tenure because he was a member of the statutorily protected class of tenured teachers. To dismiss the Complaint in this case because

the magic word "class" did not appear in it, is unjust, to say the least. Allegations of a "class" are not necessary when the existence of the group is obvious and readily inferable. In Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 97 L.Ed.216 (1952), this Honorable Court held that when one teacher comes before the court for protection of his rights, the court will view it as affecting all teachers because:

> ". . . unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

When allegations of attempts to constructively discharge are made under facts like these, it is logical to deduce the complainant is suffering solely because he has the protection of tenure. If Harden was

not entitled to the statutory protection granted to tenured teachers, he could have been summarily terminated. When the Complaint alleges violation of tenure protections, the Tenth Circuit should have viewed it as an attack against the rights of all tenured teachers, as advised by this Court.

## V.

### TITLE VII DID NOT REPEAL THE RIGHT TO ASSERT A § 1985(3) ACTION WHEN FOURTEENTH AMENDMENT RIGHTS ARE VIOLATED.

Harden respectfully submits the Tenth Circuit must have grossly misunderstood this Honorable Court's ruling in Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), wherein it was held:

> ". . . deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)."

As Harden reads it, the above holding requires dismissal under § 1985(3) of only

those cases where a Title VII right is asserted. But not all civil rights arise under Title VII, and it would be hasty generalization to apply Novotny on each and every case and dismiss it. In the case at bar, property and liberty rights are asserted that have nothing to do with discrimination. Had there been a finding by the Tenth Circuit that Harden claimed to have been discriminated against because of race, color, religion, sex or national origin, such facts would make it a proper Title VII case, and application of Novotny would be proper. But its Order only said:

> ". . . to the extent that Mr. Harden's injury can be redressed by an action under Title VII for constructive discharge, he may not bring an action under §1985. Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 375-78 (1979)."

Who will determine that extent? This Honorable Court is the last forum left to Harden in which he can again protest that nowhere in his

complaing does he allege that he was conspired against because of any race, color, religion, sex, or national origin. No way can his rights be construed to fall under Title VII! Obviously, the Tenth Circuit inferred those allegations to the detriment of Harden, and dismissed his Complaint. If the Tenth Circuit's Order is allowed to stand, then in each and every § 1985(3) action, the same presumption can be made and the cases dismissed, citing Novotny. The Tenth Circuit ruling has the practical effect of judicially repealing § 1985(3), a consequence Petitioner believes this Honorable Court did not intend when it wrote its opinion in Novotny.

## VI

**THE ELEVENTH AMENDMENT PROTECTS THE SOVEREIGNITY OF STATES, BUT IT DOES NOT PROTECT AN INSURER WHO FOR MONEY HAS BECOME THE REAL PARTY IN INTEREST.**

There are conflicting opinions among the circuits requiring resolution by this Honorable Court. Petitioner stated in his Complaint that the University is a subdivision of the State of Oklahoma and is entitled to the immunity of the Eleventh Amendment. However, the Complaint further alleged that the University has procured liability insurance, and the Petitioner, strictly limited his claim against the University to the availability of those funds from or payable by the private insurer. Thus, the University was a nominal defendant. The Tenth Circuit ruled to the effect that although the University will not respond in damages, Harden cannot collect damages from the insurer because of the state's Eleventh Amendment immunity.

Harden respectfully submits that the University had no right to claim the immunity of the Eleventh Amendment for the benefit of a private insurer. By agreeing with the University, the Tenth Circuit contravened the test of sovereignity furnished by this Court in Pennhurst State School and Hospital, et al. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Wherein this Court said:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration', or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 909, 1006, 10 L.Ed.2d 15 (1963) (citations omitted)."

A judgment requiring satisfaction from the public treasury is the issue here. This court's previous ruling in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) was precisely on this point wherein it

is said "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." The Tenth Circuit ruling is contrary to this court's ruling, above. Harden's interpretation is supported by the ruling in the Court of Appeals for the Eleventh Circuit which correctly applied this court's advice. In Travelers Indemnity Company v. The School Board of Dade County, 666 F.2d 505, (11th Cir.1982), cert.den. 549 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74 (1982), the Court of Appeals said:

> "The more significant distinction is that Edelman makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against state 'agency' must under all circumstances be paid out of State funds." (Emphasis by author of opinion.)

Obviously, had the Eleventh Circuit heard Harden's appeal instead of the Tenth

Circuit, the Respondents would have been denied Eleventh Amendment immunity. Harden believes resolution of a federal question should not depend on where it is heard, and requests granting of this writ to answer this question:

> Does the Eleventh Amendment entitle a state to claim sovereign immunity for it's insurer who for the payment of a premium agreed to be responsible for the sovereign's liability?

The aforementioned conflict of decisions between the Circuits is another justification for this Court to grant certiorari and to assume jurisdiction in this case.

## VII

### PRESUMING COMPLAINANT CANNOT PROVE A WELL-PLED FACT TO SUSTAIN A MOTION TO DISMISS IS AN ARBITRARY APPLICATION OF THE RULES.

When Harden drew his Complaint he relied on the usual and ordinary construction of the Complaint under Fed. R. Civ. P. Rule

12(b)(6). Anything which was directly inferable, or cognizable under judicial notice, was omitted to keep his Complaint within the scope of 'a short and plain statement' as required under general rules of pleading, Fed.R.Civ.P. Rule 8(a)(1)(2). The fact that pleadings by Harden were sufficient to put the Respondents on 'notice' is evidenced by the lack of any complaint from them that they could not comprehend why or for what they were being sued. Even the Circuit Court did not find allegations of conspiracy conclusory. Nevertheless, the appeal was dismissed, and in doing so, all benefit of the doubt was given to the party moving for dismissal! The key inference made against Harden, on the issue of tolling limitations is found in the Order as follows:

> "Clearly, Mr. Harden was at that time aware of all the necessary facts which now constitute his claim against the university for deprivation of due process under § 1983. There was no concealment of

> the existence of this cause of action. Reasonable inquiry would have lead to the discovery of the claim."

The Complaint alleged 'confidentiality' of the peer review process. When a professor or any other professional is told that his peers recommendations are confidential, is it reasonable for him to deliberately breach that confidentiality? To so hold is to ask him to be unprofessional. Harden believes that such shady behavior is not worthy of a professor in an institution of higher learning, and that those who have such an unethical and ignoble practice do not belong there in the first place. Just and fair evaluation is essential in a University. The Tenth Circuit does not want to consider as true Harden's allegation of confidentiality. Citing them multiple cases construing Rule 12 (b)(6) to require admitting the truth of allegations was to no avail. Although exhibits, which are not a part of the record

normally are not considered by this court, and only to illuminate the harshness of the result of unwarranted construction of this Rule, Harden apologetically attaches to the Appendix at p. 47a, a copy of the memorandum from the Provost of the University of Oklahoma to its Deans and Departmental Chairs reiterating the confidentiality of outside review as "the stated University policy concerning personnel files, which indicate that letters . . . solicited in confidence from sources external to the University will not be available to the individual." Should Harden have attached a copy of that memorandum to his complaint? He would have had he known that his allegation of 'confidentiality' would be flounced at the pleading stage. This Honorable Court has a duty to superintend and enforce the pleading rules, and granted certiorari in Montana v. Kennedy, 366

U.S. 308, 309, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), when an unwarranted construction of rules led to harsh results.

Harden respectfully suggests this case is equally deserving of review.

## VIII

### CONTINUING VIOLATIONS OF FEDERAL LAW NECESSITATE INJUNCTIVE RELIEF.

Since neither the District Court, the panel of the Tenth Circuit nor the court en banc found any actionable federal right violations, it was logical to then refuse consideration of injunctive relief for Harden.

Both the trial and appellate courts apparently only considered Paragraphs 25 and 26 of the Complaint in connection with Harden's request for injunctive relief, and disregarded allegations of the concealed conspiracy to constructively discharge him existing since 1973 (Paragraphs 4 through 7,

17 through 19, and 20), the systematic discouragement of plaintiff's graduate students (Paragraph 8), plaintiff's disproportionately large classes and unpopular subjects (Paragraph 9), violation of plaintiff's right to due process, procedural irregularities and an interference with his academic freedom (Paragraph 10), denial of the research facilities normally provided an engineering professor (Paragraph 11), discrimination in pay (Paragraph 12), refusal to grant or deny sabbatical leave (Paragraph 13), mishandling of sexual harassment investigations (Paragraph 14), unfair and inequitable evaluations for productive research, quality writings and outstanding graduate students (Paragraph 16), intimidation and threats (Paragraph 18), the individual defendants' concerted efforts to make his work and associations unbearable and intolerable (Paragraph 19) and the Univer-

sity's ignoring of all that was happening (Paragraph 20).

The basis of Harden's claim for injunctive relief is the continuing failure of the University to monitor and supervise the activities of the administrative heads of the engineering college. The failure of University, as set forth in Paragraph 25, leaves power in the hands of enumerated defendants, who, in their official capacities, are able to continue and perpetuate the conspiracy to constructively discharge Harden. Injunctive relief is sought against those defendants in their official capacities, as Dean, Associate Dean, and Director of the School of Aeronautical, Mechanical and Nuclear Engineering (Paragraph 26) to prevent them from allowing the continuing violations of the constitutional rights of plaintiff or others.

Harden has alleged numerous acts in violation of his federal, civil and due

process rights. The violations have continued for more than a dozen years, and without injunctive relief, the violations and wrongs may continue longer. Remedies designed to prevent a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. Green v. Mansour, 474 U.S. 1111, 106 S.Ct. 423, 88 L.Ed.2d. 933 (1985).

Even if the University and the Defendants in their official capacities possess Eleventh Amendment immunity in this case, both would be subject to injunctive relief against prospective violations of plaintiff's federally protected rights. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 522 L.Ed. 714 (1908).

While federal decisions agree, the Supreme Court of Oklahoma seems to have capsulized it best in Ind. Sch. Dt. No. 9 vs. Glass, 639 P.2d 1233, 1237 (Okl. 1982) when it

said: "A continuing violation is an irreparable injury for which injunctive relief is available." Only a multiplicity of suits can redress a continuing violation, on which this court has expressed its thoughts in Lee v. Bickell, 292 U.S. 415, 421, 54 S.Ct. 727, 78 L.Ed. 1337 (1934):

> "As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. Wilson v. Illinois Southern R. Co., 263 U.S. 574, 44 S.Ct. 203, 68 L.Ed. 456; Hill v. Wallace, 259 U.S. 44, 62, 42 S.Ct. 453, 66 L.Ed. 822."

## CONCLUSION AND ARGUMENT

This Petitioner suffers the undoubtedly erroneous feeling that the courts have talked about his Complaint, but that nobody has looked at it! He understands a large institution like the University has friends and acquaintances everywhere. He respects and appreciates it, himself, in its entirety. However, he feels and perceives some inadequacies and shortcomings in limited areas he feels he has failed to communicate to the courts. This Petition may be his last attempt.

The District Court and the Tenth Circuit apparently believe so strongly he alleged things he can't prove that they feel obliged to dismiss his Complaint. It may turn out to be true that he has "bit off more than he can chew," but under the rules, he has a right to try! Unless prospective witnesses are misleading him, his testimony will not have to

stand alone, but even if it did, it should be sufficient to raise a question of fact.

Petitioner asserts a fiduciary relationship exists between a professor and his supervisors in a University. To identify those deserving of promotion and recommendation, it is not unusual for one to consult another's peers. Martindall-Hubbell does it routinely for attorneys, and our opinions are sought about others under promise of confidentiality. It should hardly surprise a court that Universities would do the same thing. Incredibly, the Tenth Circuit would force one to attempt to breach that confidentiality, on penalty of forfeiting a cause of action if the other successfully concealed the breach of the fiduciary relationship until the statute of limitations expired.

This petitioner believes academic freedom and tenure, as well as the income from tenure, are constitutionally protected

rights under the decisions of this Honorable Court. Further, that while Harden did not bring a class action suit as such, he is a member of the class, and by reason of such membership, represents the interests of that group, and is not barred from stating a § 1985(3) cause of action. If necessary, and for the benefit of all academicians, Harden asks this Court to grant certiorari and clarify their rights. One can hardly imagine freedom of speech and other rights ever being much more important than they are on the campuses of our nation's colleges and universities.

Eleventh Amendment immunity for the insurance company the state pays a premium to assume its just liabilities seems like a contradiction in terms! Harden thought it pretty clear when this court said if the treasury of the sovereign is threatened, immunity applied; if an adverse judgment

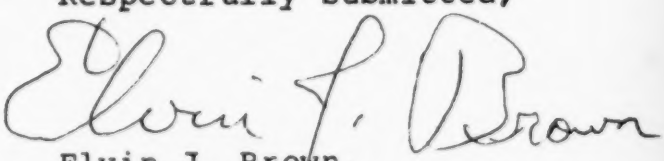
would not cost the public, immunity did not apply. He may have interpreted the court's decisions too broadly, and if so, his error warrants correction. On the other hand, if the District and Circuit Courts in this case construed them too narrowly, such also warrants explanation.

If the Respondents did to Harden the things he has alleged, some of which were confirmed by the University's Faculty Appeals Board, one would think the courts would be consumed with righteous indignation. Instead, the courts have seemed almost defensive of the alleged conduct. Perhaps the very enormity of the atrocities and their duration numb feeling for their severity. Perhaps Harden's attorney set forth too much! Even so, it provides no justification for dismissing his case in the face of the rules that require favorable and liberal construction of his pleadings when they are so attacked.

Finally, continuing violations of federal law necessitate injunctive relief. It is such a fundamental statement that little can be added. Peers on the Faculty Appeals Board found there had been violations of Harden's academic freedom, denial of due process and procedural irregularities, and they required action accordingly. Respondents elected to not appeal, as Harden's evidence will show at trial. Surely, he has a right to show which of the acts of Defendants continue, if any, in showing his need for equitable relief.

Petitioner prays certiorari be ordered in this matter.

Respectfully submitted,



Elvin J. Brown,
Attorney for Petitioner.

**APPENDIX**

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**Order Entered on October 20, 1988**

**No. 87-1418**

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell Reece Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, and Honorable David M. Ebel, Circuit Judges, United States Court of Appeals

DARREL G. HARDEN,

Plaintiff-Appellant,

v.

C.W. BERT; D.M. EGLE; J.E. FRANCIS; M.C. JISCHKE; T.J. LOVE; W.R. UPTHEGROVE, Individually; THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a subdivision of the State of Oklahoma,

Defendants-Appellees.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled, the suggestion for rehearing en banc is denied.

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**No. 87-1418.**

**Order Filed September 6, 1988**

DARREL G. HARDEN,

Plaintiff-Appellant,

v.

C.W. BERT; D.M. EGLE; J.E. FRANCIS; M.C. JISCHKE; T.J. LOVE; W.R. UPTHEGROVE, Individually; THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a subdivision of the State of Oklahoma,

Defendants-Appellees.

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**ORDER AND JUDGMENT**

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Before ANDERSON, TACHA, and BRORBY, Circuit Judges.

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This case is an appeal from an order of the district court dismissing the complaint of the appellant, Darrel G. Harden. Mr. Harden contends that the district court, in dismissing his complaint, erred in its

determination that the defendants, the Board of Regents of the University of Oklahoma and certain of its employees, were immune from monetary damages under the eleventh amendment, that Mr. Harden had failed to state a claim for injunctive relief, and that his claims were barred under the applicable statute of limitations. We concur with the district court's disposition of this case and therefore affirm.

In 1973, Mr. Harden, a tenured engineering professor at the University of Oklahoma, applied for a promotion to full professor. He provided a committee of his peers with a list of ten references to be contacted as to his credentials. The committee recommended him favorably, but the promotion was ultimately denied by a final review panel. Mr. Harden was then informed by a member of this panel that he was not promoted because his references were not favorable. Mr. Harden

took no action at that time to protest the denial of this promotion.

In the spring of 1985, nearing retirement, Mr. Harden decided to again apply for a promotion. When he began to assemble his references, he learned that a number of them had not been contacted by the committee considering him in 1973. On February 28, 1986, believing that university officials had improperly concealed their reasons for not promoting him in 1973 and had otherwise conspired to make his working conditions intolerable, Mr. Harden filed a complaint in federal district court.

In addition to relating the above events, Mr. Harden's complaint described other occurrences between 1973 and 1985. In particular, it indicated his students had been discouraged in their research, that Mr. Harden had been given large and unpopular classes to teach, that he was given poor

professional evaluations, that university officials had intervened in his grading process and had improperly investigated charges against him for sexual misconduct, and that he had been denied other raises and promotions, research facilities, and approval for a sabbatical. Mr. Harden premised the defendants' liability for these transgressions on 42 U.S.C. §§ 1983, 1985, and 1986 (1982).

On May 5, 1986, in response to a motion by the defendants, the district court dismissed Mr. Harden's claim on the grounds that the defendants were immune under the eleventh amendment. Mr. Harden filed a second amended complaint, wherein he alleged that the defendants were not immune to the extent that the university had obtained liability insurance. The remainder of the second amended complaint was in all material respects the same as Mr. Harden's first complaint.

On September 19, 1986, the defendants again moved the court to dismiss Mr. Harden's complaint. The district court granted this motion, dismissing the complaint on three separate grounds. First, it ruled that both the university and the individuals named as defendants were absolutely immune under the eleventh amendment, and that this immunity had not been waived to the extent of any liability insurance procured by the university. Second, it held that Mr. Harden had failed to allege the necessary facts to support the award of injunctive relief against the defendants. Third, it reasoned that, in any event, Mr. Harden's claims under §§ 1983, 1985, and 1986 were barred by the statute of limitations. We agree with each of these conclusions, and we affirm the dismissal of Mr. Harden's complaint for the additional reason that Mr. Harden's allegations that the defendants conspired to

deprive him of due process and equal protection fail to state a claim upon which relief can be granted.

When ruling on a motion to dismiss either for lack of jurisdiction or failure to state a cause of action, our role is a limited one. We do not address whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In doing so, we construe allegations in the complaint favorably to the pleader. Id. Only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief will we dismiss the complaint. Id. Mindful of these constraints, we nevertheless rule that Mr. Harden's complaint must be dismissed.

First, Mr. Harden complains of activities which commenced in 1973 and which

presumably continued up to the filing of his complaint in 1986. Specifically, Mr. Harden alleges he was denied due process by the university in 1973 when his promotion was denied. In addition, he claims that the individual defendants conspired against him during this time, but that he did not discover the conspiracy until 1985. The district court ruled that these claims, along with Harden's other claims, were barred by the statute of limitations, which had not been tolled by Mr. Harden's failure to discover the alleged conspiracy. We agree, to the extent the statute of limitations is applied to Mr. Harden's allegations of denial of due process and conspiracy in 1973.

The statute of limitations applicable to Mr. Harden's civil rights claims is determined by state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Clulow v. Oklahoma, 800 F.2d 1291,

1299 (10th Cir. 1983). Likewise, we look to state law to determine whether the limitations period has been tolled. Johnson, 421 U.S. at 463-64; Clulow, 700 F.2d at 1312. We have held that, for the purposes of §§ 1983, 1985, and 1986, the applicable statute of limitations under Oklahoma law is two years. Clulow, 700 F.2d at 1299; Crosswhite v. Brown, 424 F.2d 495, 496 (10th Cir. 1970). We have ruled that the limitations period is not tolled unless the plaintiff can show "concealment of facts which would prevent him from knowing that he had a cause of action." Clulow, 700 F.2d at 1301. Failure to exercise due diligence in discovering the claim will prevent the limitations period from being tolled, where a reasonable inquiry would have led to the discovery of the claim. See, e.g., Sade v. Northern Natural Gas Co., 483 F.2d 230, 235 (10th Cir. 1973); Knudson v. Weeks, 394 F. Supp. 963, 974 (W.D. Okla.

1975); In Re Woodward, 549 P.2d 1207, 1209 (Okla. 1976); Wills v. Black & West, Architects, 344 P.2d 581, 584 (Okla. 1959).

In this case, Mr. Harden claims that he was denied due process in 1973 when the university rejected his promotion. Clearly, Mr. Harden was at that time aware of all the necessary facts which now constitute his claim against the university for deprivation of due process under § 1983. There was no concealment as to the existence of this cause of action. Reasonable inquiry would have led to the discovery of the claim. Clulow, 700 F.2d at 1301; Morris v. Wise, 293 P.2d 547 (Okla. 1955). Therefore, it is barred by the two-year statute of limitations. In addition, although we recognize that caution is advised in any pretrial disposition of conspiracy allegations in civil rights actions, Clulow, 700 F.2d at 1303, we similarly agree with the district court that Mr. Harden

failed to exercise minimal diligence in discovering the facts relating to the alleged conspiracy. A reasonable person would have been put on inquiry when informed that his professional references were unfavorable to learn the reasons behind such poor recommendations. See Kansas City Life Ins. Co. v. Nipper, 174 Okla. 634, 51 P.2d 741 (1935). Consequently, we hold that Mr. Harden's claim for conspiracy is barred, insofar as it regards the denial of his promotion in 1973.

Second, Mr. Harden names as defendants the Board of Regents of the University of Oklahoma and six additional individuals, all of whom, as of the date of the complaint, were employees of the University. The Board of Regents and these individuals, in their official capacities, are considered an arm of the state. Gay Activists Alliance v. Board of Regents, 638 P.2d 1116, 1123 (Okla. 1981). As such, under the eleventh amendment, they

are immune from liability in a suit which seeks damages in federal court. The defendant's immunity can be overridden only where there has been an explicit waiver of that immunity. Edelman v. Jordan, 415 U.S. 651, 673 (1974).

In enacting the Civil Rights Act of 1871, Congress did not override the states' eleventh amendment immunity. Quern v. Jordan, 440 U.S. 332, 345 (1979). Thus, Mr. Harden must demonstrate an explicit waiver by the state to maintain his suit against the defendants. He seeks to convince us that this waiver occurred with the university's acquisition of liability insurance. He argues that the insurance fund, not the university, is the real party in interest in this case, and that the eleventh amendment is not implicated, since funds to pay any judgment he receives against the defendants will not come from state coffers.

We have examined the legislation by which Mr. Harden claims that a waiver of eleventh amendment immunity occurred. We see no evidence whatsoever that the State of Oklahoma, by authorizing its institutions of higher education to procure liablity insurance, intended to waive eleventh amendment immunity. See Okla. Stat. tit. 70, § 4313 (Supp. 1988). We are likewise not convinced by any argument that the state has constructively consented to suit by authorizing the procurement of liability insurance. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Edelman v. Jordan, 415 U.S. at 673. We further conclude that the named defendants are the proper parties in interest in this case. We therefore hold that the district court correctly ruled that the defendants were immune in their official capacities from an action which seeks the recovery of monetary damages.

Third, we concur with the district court that Mr. Harden has failed to allege sufficient facts to justify the granting of an injunction against the defendants. Mr. Harden must allege facts to bring his case within some acknowledged basis for equity jurisdiction. Mere conclusory allegations to this effect are insufficient. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 145 (1937). He has not alleged that his remedy at law would be inadequate or that the recovery of damages would not fully redress his injuries. Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy, 238 F.2d 936, 942 (10th Cir. 1956); see also, Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n, 725 F.2d 564, 570 (10th Cir. 1984). He has not set forth facts showing that he will suffer irreparable harm if the requested injunctions are not granted. Ogden River, 238 F.2d at 942; Martinez v.

Winner, 548 F. Supp. 278, 311 (D. Colo. 1982). Moreover, were the court to permit such injunctive relief, we cannot determine what specific action Mr. Harden seeks to enjoin. Broad "obey the law" injunctions or injunctions against discrimination in general are simply impermissible. Fed. R. Civ. P. 65(d); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir.), cert. denied, 439 U.S. 835 (1978). We conclude that Mr. Harden's claims for injunctive relief were properly dismissed.

Fourth, Mr. Harden asserts several additional claims for conspiracy, generally alleging that the defendants conspired to deprive him of due process and equal protection by attempting to constructively discharge him between 1973 and 1985. He brings these claims under § 1983 and § 1985. Since we have ruled that the defendants are absolutely immune in their official capaci-

ties from a suit for money damages, such claims for conspiracy are only cognizable against the defendants in their personal capacities. See Kentucky v. Graham, 473 U.S. 159, 165-68 (1985); Schauer v. Rhodes, 416 U.S. 232, 237-38 (1974). Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Kentucky v. Graham, 473 U.S. at 165. Although not a basis for the district court's ruling, we hold that Mr. Harden has failed to state a claim for conspiracy against the defendants in their personal capacities under both § 1983 and § 1985. See Pullman v. Chorney, 712 F.2d 447, 449 (10th Cir. 1983).

In a personal capacity suit under § 1983, two and only two allegations are required: the plaintiff must allege that some person has deprived him of a federal right, and he must allege that the person who

has deprived him of a federal right acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Mr. Harden's complaint lacks both of these essential allegations. First, there is no indication in the complaint that the defendants acted in their individual capacities under color of state law. Even were we to assume that, by a general reading of the complaint, Mr. Harden intended to make such an allegation, he fails to set forth facts showing the deprivation of a federal right.

Mr. Harden attempts to establish that his federal right to procedural due process was denied when the defendants allegedly conspired to deprive him of a congenial work environment and to constructively discharge him without providing him with a chance to contest these actions. A § 1983 claim, however, must be "grounded on the violation of a right of substance and not merely on

theoretical speculation that some right has been infringed." Holmes v. Finney, 631 F.2d 150, 154 (10th Cir. 1980). Mr. Harden fails to identify the federally protected property or liberty interest which was taken by the defendants without due process. Id. His claims regarding poor working conditions, professional criticism, and denial of raises, privileges, and promotions do not rise to the level of fundamentally protected liberty or property rights. See, e.g., Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979); McElearney v. University of Il. at Chicago Circle Campus, 612 F.2d 285 (7th Cir. 1979); Teachers United for Fair Treatment v. Anker, 445 F. Supp. 469 (E.D. N.Y. 1977); Olson v. Trustees of California State Univ., 351 F. Supp. 430 (C.D. Cal. 1972). Second, Mr. Harden's complaint does not indicate that these rights were denied without notice and an opportunity to be heard so as to constitute

an abridgement of procedural due process. Jennings v. Nester, 277 F.2d 153, 154 (7th Cir. 1954)("There must, of course, be an actual denial of due process before a cause arises."). On the contrary, it appears from his complaint that a number of these problems were eliminated when presented to university officials. Mr. Harden's complaint thus fails to state a cognizable claim for conspiracy to deprive due process under § 1983.

Similarly, Mr. Harden's effort to establish a conspiracy to deny him equal protection under § 1985 is unavailing. To establish a conspiracy under § 1985 based on denial of equal protection, a complainant must allege some sort of invidious class-based discrimination of the type envisioned by the framers of the Civil Rights Act of 1871. United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 835-39 (1983); Griffin v. Breckenridge, 403 U.S. 88,

101-02 (1971); Brown v. Reardon, 770 F.2d 896, 905 (10th Cir. 1985). The complaint is simply devoid of any such allegation. In addition, to the extent that Mr. Harden's injury can be redressed by an action under Title VII for constructive discharge, he may not bring action under § 1985. Great Am. Federal Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375-78 (1979).

Finally, as we have determined that Mr. Harden fails to state a claim under § 1985 against the named individuals, his derivative claim against the university under § 1986 must correspondingly fail. Campbell v. Amax Coal Co., 610 F.2d 701 (10th Cir. 1979).

For the foregoing reasons, the judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| DARREL G. HARDEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. CIV-86-0453-W |
| | ) | |
| C.W. BERT, et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Defendants, C.W. Bert, D.M. Egle, J.E. Francis, M.C. Jischke, T.J. Love, W.R. Upthegrove, and the Board of Regents of the University of Oklahoma, move this Court to dismiss Plaintiff's complaint, pursuant to Rule 12 (B), Fed. R. Civ. P., on the grounds this Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

Plaintiff alleges jurisdiction pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986. He seeks the total amount of ten million

dollars in actual damages from Defendants for alleged violations of his rights, his personal injuries and resulting damages, to be proportioned among each individual defendant and the University. Plaintiff additionally seeks one million dollars in exemplary damages against each of the individual defendants, to punish them for their alleged intentional, negligent or wrongful conduct. Finally, Plaintiff seeks injunctive relief against the University of Oklahoma and the officials of the College of Engineering, plus costs and attorney fees.

Plaintiff filed his complaint February 28, 1986. Defendants filed a Motion to Dismiss March 21, 1986, which this Court granted in part, pursuant to its Order of May 5, 1986. The Order dismissed the Board of Regents and the individual defendants in their official capacities. Subsequently, plaintiff filed a Motion to Reconsider or in

the alternative motions for new trial or for leave to file an amended complaint and second amended complaint. This Court granted Plaintiff leave to file a second amended complaint August 7, 1986; plaintiff filed said complaint on August 15, 1986.

On a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Pursuant to Rule 12(b)(6) Fed. R. Civ. P., the factual allegations of the complaint must be taken as true, and all reasonable inferences drawn from them must be indulged in favor of the complaint. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976). All well pleaded facts in the complaint must be admitted, as distinguished from conclusory allegations. Jones

v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

It appears to this Court, after a careful review of the second amended complaint and the original complaint, that the differences between the two are insignificant for purposes of the motion at issue herein. The Court notes that Plaintiff supplements his original argument regarding Eleventh Amendment immunity, and attempts to recharacterize it by alleging said immunity "does not exist to the extent of [liability] insurance [of the Board of Regents]," referring to a source, which allegedly does not constitute public funds held in the State Treasury. Plaintiff alleges the State of Oklahoma uses this "source" to purchase liability insurance. It is true that the Oklahoma Legislature has authorized the Board of Regents to purchase liability

insurance. However, such authorization does not place the Board of Regents outside the scope of Eleventh Amendment immunity protection. One additional alteration in Plaintiff's second amended complaint is a request for injunctive relief. However, plaintiff fails to state specifically what kind of injunctive relief he is requesting.

This Court's Order of May 5, 1986, states the Eleventh Amendment applies to the instant case, that the University of Oklahoma is an arm of the State, and that therefore the University is immune from suit in federal court. See, Order of May 5, 1986, at 2, 3, 4. To reiterate, briefly, the basis of those determinations, the Court again reminds Plaintiff the Tenth Circuit has held the Board of Regents of the University of Oklahoma is an arm of the State and is immune from suit in federal court pursuant to the Eleventh Amendment. Sarabian v. University

of Oklahoma Board of Regents, No. 82-1276 slip op. (10th Cir. 1984). The Order of May 5, 1986 specifically discusses Plaintiff's assertion the State of Oklahoma waived its Eleventh Amendment immunity, to the extent of insurance coverage. This Court perceives no difference, for purposes of analysis herein, between Plaintiff's original argument of waiver and Plaintiff's amended argument that the Board of Regents is outside the scope of protection afforded by Eleventh Amendment immunity. In the above referenced Order, the Court states:

> Assuming, arguendo, that Oklahoma does have liabiity insurance, the Court holds that it does not constitute an express waiver of the State's Eleventh Amendment immunity. Korgich v. Regents of New Mexico School of Mines, 582 F.2d 549 (10th Cir. 1978)." See also Nichols v. Department of Corrections, 631 P.2d 746 (Okla. 1981).
>
> Order of May 5, 1986 at 4.

Plaintiff's allegation that the Board of Regents is outside the scope of protection

afforded by Eleventh Amendment immunity, to the extent of insurance coverage, ignores well-defined principles of Tenth Circuit case law. Accordingly, consistent with its Order of May 5, 1986, Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby GRANTED as to Defendant Board of Regents of the University of Oklahoma.

As to the remaining defendants, C.W. Bert, D.M. Egle, J.E. Francis, M.C. Jischke, T.J. Love, and W.R. Upthegrove, the Court, again adopting the principles articulated in its Order of May 5, 1986, distinguishes between official capacity and personal capacity. Plaintiff's action against these defendants in their official capacity does not constitute a suit against each individual official personally, for the real party in interest is the entity, the Board of Regents of the University of Oklahoma. Thus, Plaintiff seeks to recover the damage judgment in

an official capacity suit by looking to the government entity itself. Kentucky v. Graham, 53 U.S.L.W. 4966, ____ U.S. ____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) at 4967. The Supreme Court has held the Eleventh Amendment bars suit in federal court when state officials are sued for damages in their official capacity. See Order of May 5, 1986 at 2, 3, citing Graham, 53 U.S.L.W. at 4968; Corey v. White, 457 U.S. 85, 90, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982); Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), Reh. denied, 416 U.S. 1000. Plaintiff's Eleventh Amendment argument, as applied to the remaining defendants in their official capacities, is similar to Plaintiff's argument that the Board of Regents is outside the scope of Eleventh Amendment protection. The Court believes the reasoning and authority regarding the Board of Regents also applies to the remain-

ing defendants in their official capacities. Therefore, the Court declines to reiterate its rationale for holding the Eleventh Amendment applies in the instant case. The Court makes the same determinations on this issue as to the remaining defendants in their official capacities that it makes as to Defendant Board of Regents. Since the Court lacks subject matter jurisdiction as to Defendant Board of Regents, the Court also lacks subject matter jurisdiction as to Defendants C.W. Bert, D.M. Egle, J.E. Francis, M.C. Jischke, T.J. Love, and W.R. Upthegrove, in their official capacities.

Accordingly, Defendants' Motion to Dismiss Defendants C.W. Bert, D.M. Egle, J.E. Francis, M.C. Jischke, T.J. Love, and W.R. Upthegrove in their official capacities for lack of subject matter jurisdiction is HEREBY GRANTED.

Plaintiff requests an injunction in his second amended complaint, on the basis he was

denied "fair play and due process guaranteed him and others under the Fourteenth Amendment." See Second Amended Complaint, para. 25. Plaintiff requests this Court to enjoin the University and to prohibit it "from ignoring the denial," and to mandatorily enjoin the University "to affirmatively provide such constitutional protections and guarantees to Plaintiff and others in the College of Engineering of the University of Oklahoma." See Plaintiff's Second Amended Complaint, para. 25. Plaintiff also requests this Court to grant an injunction against the individual defendants in their official capacity. Second Amended Complaint para. 26. However, Plaintiff fails to plead the necessary facts to justify such extraordinary relief. Plaintiff must set out in his complaint, with certainty and definiteness, all essential facts on which he relies for relief, including irreparable injury and the inadequacy of a remedy at law.

Rule 8, Fed. R. Civ. P. Plaintiff's complaint does not allege irreparable harm; nor does it state clear facts which demonstrate no adequate remedy at law exists. See Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935); Koerpel v. Heckler, 797 F.2d 858, 866 (10th Cir. 1986).

Accordingly, Defendants' Motion to Dismiss the complaint is HEREBY GRANTED to the extent it requests injunctive relief. Since the Court dismisses the claim for injunctive relief on this ground, the Court declines to comment on whether or not the Eleventh Amendment bars injunctive relief.

Defendants' also argue the statute of limitations has expired in the case at bar. Defendants allege all of the events alleged in Plaintiff's second amended complaint occurred, at a minimum, more than two years ago, with some events taking place four years ago; five years ago; ten years ago; and twenty-three years ago. Plaintiff attempts

to circumvent the statute of limitations by stating he failed to discover the alleged violations, or the "meaning" of the alleged deprivations he allegedly suffered at the hands of these defendants, until 1985 and 1986. This Court finds Plaintiff's failure to discover the alleged violations until many years after the date on which they allegedly occurred is fatal to his causes of action under §§ 1983, 1985 and 1986. The Tenth Circuit has established that the statute of limitations in 1983 actions is the same as the state jurisdiction statute for violation of personal rights. In Oklahoma this is two years, pursuant to 12 Okla. Stat. § 95 (1971). Garcia v. Wilson 731 F.2d 640 (10th Cir. 1984), aff'd, 471 U.S. 261, ____ S.Ct. ____, ____ L.Ed.2d ____ (1985). Additionally, the statute of limitations begins to run when the alleged wrong took place, not when the results of such wrong impacted the party.

See Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981). Clearly, all of Plaintiff's claims are barred by the applicable statute of limitations. Therefore, Plaintiff's second amended complaint is HEREBY DISMISSED. The Court does not reach the merits of plaintiff's §§ 1983, 1985 and 1986 claims, as those claims are barred by the applicable statute of limitations. Plaintiff fails to document the date his alleged defamation claim arose. Therefore, the Court cannot determine whether said claim is time barred. Accordingly, Plaintiff's defamation claim may remain before the Court if the Court chooses in its discretion to retain jurisdiction of this pendent claim.

The Court finds it lacks subject matter jurisdiction as to the claims against the University of Oklahoma Board of Regents, and the individuals named as defendants, C.W. Bert, D.M. Egle, J.E. Francis, M.C. Jischke,

T.J. Love, and W.R. Upthegrove, acting in their official capacity. As to the remainder of Plaintiff's claims, against the Defendants acting in their individual capacities, C.W. Bert, D.M. Egle, J.E. Francis, M.D. Jischke, T.J. Love, and W.R. Upthegrove, the Court finds that Plaintiff's claims under 42 U.S.C. §§ 1983, 1985 and 1986 are barred by the applicable statute of limitations. Therefore, this Court, in its discretion, declines to retain jurisdiction of any pendent claims which Plaintiff alleges, including, but not limited to, Plaintiff's claims of defamation. The pendent claims are HEREBY DISMISSED.

Accordingly, Defendants' multiple motions to dismiss are hereby GRANTED. Plaintiff's second amended complaint is hereby DISMISSED.

ENTERED this 23rd day of February, 1987.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

### Federal Rules of Civil Procedure

### Rule 12(b), Defenses and Objections. How Presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with

one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

**Rule 8(a), Rules of Pleading. Claims for Relief**

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

**Statutes**

**42 U.S.C. § 1988, Proceedings in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by

the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the consititution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punish-

ment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

**42 U.S.C. § 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**42 U.S.C. § 1985(3), Depriving persons of rights or privileges**

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws;

or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

**42 U.S.C. § 1986, Action for neglect to prevent conspiracy**

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceed-

ing five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

**42 U.S.C. § 2000e-2. Descrimination because of race, color, religion, sex, or national origin**

(a) **Employers.** It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**Constitutional Provisions**

**Amendment XI, Suits against states--Restriction of judicial power**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**Amendment XIV**

**Section 1. Citizens of the United States**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The University of Oklahoma

OFFICE OF THE PROVOST
660 Parrington Oval, Room 104
Norman, Oklahoma 73019
(405) 325-3221

To: Norman Campus Deans and Departmental Chairs

From: J. R. Morris

Date: September 17, 1985

Subject: Tenure: Outside Evaluations and Letters Requesting the Evaluation

Two questions have arisen concerning what information must be supplied to a tenure candidate concerning the letters of evaluation solicited outside the University concerning that candidate. You should know what they are and what responses are being given.

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The first question is whether the candidate has the right to see the form letter used to solicit the outside evaluation. The answer to that question is that the individual may see that form letter upon request. As a form letter, of course, it would not show the names of individuals being solicited.

The second question is whether the department must give the tenure candidate the names of those being solicited if the tenure candidate requests that information. We have reviewed this question with Legal Counsel. The conclusion is that a department does **not** need to share the names of those whose views are being solicited. This is consistent with the stated University policy concerning personnel files, which indicate that letters that apply to tenure that are

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solicited in confidence from sources external to the University will not be available to the individual. Confidentiality is also mentioned in the Provost's annual request for tenure recommendations.

I thought that it would be desirable for all of the colleges to understand these limits in view of the questions that have been raised.

JRM/cvs
cc: Dr. Stanley Ward
Associate Provost Joseph C. Ray
Professor Penny Hopkins